In the Supreme Court

OF THE

United States

OCTOBER TERM, 1945

No. [redacted] 128

LIBERTY MUTUAL INSURANCE COMPANY (a corporation), and CONTRACTORS PACIFIC NAVAL AIR BASES, an association,

Petitioners,

vs.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District and WALTER L. WOOD,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

THEODORE HALE,
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Subject Index

Table of Authorities Cited

Court Rules

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LIBERTY MUTUAL INSURANCE COMPANY (a corporation), and CONTRACTORS PACIFIC NAVAL AIR BASES, an association,
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WARREN H. PILLSBURY, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District and WALTER L. WOOD,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Supreme Court of the United States:

Your petitioners, Liberty Mutual Insurance Company, a corporation, and Contractors Pacific Naval

Air Bases, an association, respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered March 18, 1946 (rehearing denied April 23, 1946) in an action numbered and entitled on its docket No. 11,094, Liberty Mutual Insurance Company, a corporation, and Contractors Pacific Naval Air Bases, an association, Appellants, vs. Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, and Walter L. Wood, Appellees, wherein the appeal was dismissed by the said Circuit Court because of alleged lack of jurisdiction.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case came to the United States District Court for the Northern District of California, Southern Division, on an amended libel for mandatory injunction, filed May 12, 1944, and directed against Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th District, and Walter L. Wood. The libel was filed in accordance with the terms of Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act of March 24, 1927, 44 Stats. 1424 (33 U.S.C.A., Section 901, et seq.), as made applicable to persons employed at certain defense base areas and other places by the Act of August 16, 1941, 55 Stats. 622. (42 U.S.C.A., Secs. 1651 to 1654.) (R. 9-22.)

On June 11, 1944, the United States Attorney at San Francisco, representing Deputy Commissioner Pillsbury, moved to dismiss the amended libel on the ground that said libel did not state a cause of action, did not entitle libelants to any relief, and, more particularly, "that it appears from the amended libel, including the transcripts of testimony taken before the deputy commissioner and made a part of the amended libel, that the findings of fact of the deputy commissioner in the corrected compensation order filed by him on April 15, 1944, complained of in the amended libel, are supported by evidence and under the law said findings of fact should be regarded as final and conclusive." (R. 23.)

Briefs were filed by both parties on the motion to dismiss, the matter was argued, and the motion was submitted. (R. 68.)

On December 26, 1944, the clerk of the District Court filed the following order:

"(Title of Court and Cause.)

"ORDER

It is ordered that the motion of respondent Warren H. Pillsbury, to dismiss the amended libel for mandatory injunction filed herein be and the same is hereby granted and said amended libel is herein dismissed.

Dated, December 26th, 1944.

Michael J. Roche,
United States District Judge."

(Endorsed): Filed Dec. 26, 1944. (R. 24.)

It will be noted that the above order was "filed" but not "entered". Libelants, following the custom of the court, did not appeal from this order, but awaited the finding of facts and conclusions of law and a formal decree. On February 21, 1945, the findings of fact and conclusions of law and the formal decree were filed. The decree was also entered in Volume 35 of Judgments and Decrees, at page 368. The decree affirms the award of Deputy Commissioner Warren H. Pillsbury and orders the case dismissed. (R. 24-28.)

On April 24, 1945, an appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit. (R. 30-39.) Briefs followed, and the matter came on for hearing in the Circuit Court on February 6, 1946. On March 18, 1946, said Court ordered the matter dismissed because of alleged lack of jurisdiction. An opinion was filed. (R. 173-176.) In this opinion it is stated:

> "The 'order' of December 26, 1944, was a final decision, within the meaning of Sec. 128(a) of the Judicial Code, 28 U.S.C.A. Sec. 225(a) and hence was appealable, but no appeal was taken therefrom. On February 21, 1945, the Judge signed and caused to be filed a 'decree' purporting to dismiss the amended libel which, in fact, was dismissed by the 'order' of December 26, 1944. From the 'decree' of February 21, 1945, this appeal was taken on April 24, 1945.
>
> As heretofore stated, the 'order' of December 26, 1944, was a final decision. There was no other final decision in this case. No other final decision

was necessary. The 'decree' of February 21, 1945, was not a final decision and was not appealable."

"Appeal dismissed."

It is your petitioner's contention that the United States Circuit Court of Appeals for the Ninth Circuit erred (1) in declaring the order of December 26, 1944, a final order and appealable; (2) in declaring the decree of February 21, 1945, not a "final" order and not appealable; and (3) in dismissing the appeal. These facts constitute a summary statement of the matter involved.

STATEMENT OF BASIS OF JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 18, 1946. (R. 175.) A petition for rehearing was denied April 23, 1946. (R. 176.)

The three months period for filing this petition begins to run from April 23, 1946. Jurisdiction of this Court is invoked under the Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938, as amended, Judicial Code, Sec. 240, U.S.C.A. Title 28, Sec. 347, also under the provisions of Rule 38, 5(b), Rule of the Supreme Court.

Jurisdiction was conferred on the District Court by Secs. 18 and 21(b) of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 33 U.S.C.A. 901 et seq., and the "Defense Bases Act" of August 16, 1941, 55 Stats. 622 (42 U.S.C.A., Secs. 1651 to 1654.)

QUESTIONS PRESENTED.

Whether the Circuit Court of Appeals erred:

1. In declaring the order of December 26, 1944, a final order and appealable;

2. In declaring the decree of February 21, 1945, not a final order and hence not appealable;

3. In dismissing the appeal.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

1. Your petitioners, while following the mode of appeal, in use as long as their counsel can remember, and certainly since March 4, 1927, the date of passage of the Longshoremen's and Harbor Workers' Compensation Act, suddenly find their case dismissed. As they see the matter, this is through no fault of their own. To the contrary, had they appealed from the order of December 26, 1944, they would have expected to have their appeal dismissed as premature on the authority of *City and County of San Francisco v. McLaughlin,* 9 F. (2d) 407, and *Wright v. Gibson,* 128 F. (2d) 865, the latter saying:

> "A *judgment* dismissing an action is a final decision and hence is appealable. An *order* which merely grants a motion to dismiss an action is not a final decision and is not appealable."

2. The Court in declaring the order of December 26, 1944, a final order and dismissing the cause because an appeal had not been taken therefrom deprived

libelants of findings of fact. The right to findings is given them by Rule 52(a) of the Rules of Civil Procedure, which says in part

> "52(a). Effect. In all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment, and in granting or refusing interlocutory injunctions the Court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action * * *."

3. The order of December 26, 1944, is incomplete. Following are the differences between this order and the decree of February 21, 1945.

(a) The date of the trial is stated in the decree, but not in the order.

(b) The decree contains a statement of the character of the evidence used at the trial; the order does not.

(c) The amended libel is by the decree dismissed *without leave to amend.* The words in italics do not appear in the order.

(d) The words directing "that the amended compensation award of respondent Deputy Commissioner Warren H. Pillsbury, dated and filed on the 15th day of April, 1944, directing libelants above named to pay the claimant Walter L. Wood compensation as provided therein be and the same is hereby affirmed" do not appear in the order. They are, however, found in the decree.

(e) *That each party will pay its own costs.* The words printed in italics do not appear in the order.

(f) The approval of libelants' counsel as to form does not appear in the order as required by Rule 5(d), Rules of Practice of the District Court for the Northern District of California.

(g) The words: *Entered in Vol. 35, Judg. and Decrees at page 368* do not appear in the order, nor does the order contain any notation of entry indicating that it was spread in full on the pages of any book of the Court.

4. Because, where a case is tried and issues of fact determined, no abbreviated order, memorandum or notation of the Court is final as long as findings of fact and conclusions of law are yet to come.

5. Because this decision, if allowed to become the final determination of this case, will be a precedent establishing a lack of uniformity in the matter of terminating cases in the District Courts of the United States. Incidentally, wherever a case in the District Court is terminated by an order, the unsuccessful litigant will be deprived of the findings guaranteed him by Rule 52(a) of the Rules of Civil Procedure.

WHEREFORE, petitioners pray that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that

Court to certify and send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in said case numbered on its docket No. 11,094, that the judgment of said Circuit Court be reversed, that petitioners have said case decided on its merits in said Circuit Court, and that petitioners have such other and further relief in the premises as to this Court may seem proper.

Dated, San Francisco, California,
May 27, 1946.

THEODORE HALE,
Counsel for Petitioners.

CARROLL B. CRAWFORD,
Of Counsel.

CERTIFICATE OF COUNSEL.

Theordore Hale, counsel and Carroll B. Crawford, of counsel, hereby certify that they are the attorneys for Liberty Mutual Insurance Company, a corporation, and Contractors Pacific Naval Air Bases, an association, the petitioners herein for a writ of certiorari; that in their judgment the above petition is well founded in point of law and that said petition is not interposed for delay.

Dated, San Francisco, California,
May 27, 1946.

THEODORE HALE,
Counsel for Petitioners.

CARROLL B. CRAWFORD,
Of Counsel.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals is reported in ..... Fed. (2d) ....., and appears in the record at page 173.

No opinion was rendered in the District Court.

The opinion of the Circuit Court of Appeals cites no authorities, merely saying that the "order" of December 26, 1944, "was a final decision, within the meaning of Sec. 128(a) of the Judicial Code, 28 U. S. C. A. Sec. 225(a), and hence was appealable but no appeal was taken therefrom".

Neither is any authority given for the Court's statement that the "decree" of February 21, 1945, was not a final decision and was not appealable.

II.

STATEMENT OF JURISDICTION.

A concise statement of the grounds on which the jurisdiction of this Court is invoked is given in the petition (p. 5), and, by reference thereto, is adopted here.

III.

CONCISE STATEMENT OF THE CASE.

A summary of the matter involved is given in the petition (p. 2). To avoid duplication, that statement is incorporated herein by reference as a concise statement of the case.

IV.

SPECIFICATION OF ERRORS.

The errors intended to be urged are those specified in the petition as the questions presented and numbered 1-3 (p. 6), all of which are specifically assigned as error.

V.

SUMMARY OF ARGUMENT.

1. The effect of the ruling of the Court in cases of this character, where issues of fact are tried by the Court, would be to deprive an unsuccessful litigant of findings of fact and conclusions of law, as provided by Rule 52(a) of the Rules of Civil Procedure.

2. The ruling of the Court is a violation of Rule 5(d), Rules of Practice of the District Court of the United States for the Northern District of California.

3. The Court erred in declaring the order of December 26, 1944, final and appealable inasmuch as it lacked certain indispensable requisites of a final judgment.

4. The ruling of the Circuit Court is unauthorized by statute and contrary to the decisions.

ARGUMENT.

I.

THE EFFECT OF THE RULING OF THE COURT IN CASES OF THIS CHARACTER, WHERE ISSUES OF FACT ARE TRIED BY THE COURT, WOULD BE TO DEPRIVE AN UNSUCCESSFUL LITIGANT OF FINDINGS OF FACT AND CONCLUSIONS OF LAW, AS PROVIDED BY RULE 52(a) OF THE RULES OF CIVIL PROCEDURE.

Rule 52(a) of the Rules of Civil Procedure provides:

> "52(a) Effect. In all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the Court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses. The findings of a master, to the extent that the Court adopts them, shall be considered as the findings of the Court."

Cases upholding this rule are as follows:

> "It is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52(a) of the Rules

of Civil Procedure, 28 U.S.C.A. following Section 723c."

Mayo v. Lakeland Highways Canning Company, 309 U. S. 310, 316, 60 S. Ct. 517, 520.

This was an action for a mandatory injunction.

"A discussion of portions of the evidence and the District Court's reasoning in its opinion do not constitute the special and formal findings by which it is the Court's duty appropriately and specifically to determine all issues presented and are not a compliance with equity rule requiring fact findings and conclusions of law to be stated. Equity Rule 70½, 28 U.S.C.A., following Section 723c."

Interstate Circuit v. U. S., 304 U. S. 55, 58 S. Ct. 768, 82 L. Ed. 1146.

See also:

Kelley v. Everglades Drainage Dist., 319 U. S. 415, 420, 63 S. Ct. 1141, 1144. (Paragraph 7.)

"Where the issues cannot be decided satisfactorily on appeal without findings of fact by the trial court, the cause should be remanded in order that findings be made. *An opinion of the trial court is not sufficient,* where it does not present the findings or conclusions of the Court on relevant issues."

Woodruff v. Heiser, 150 F. (2d) 869. (C.C.A. 10.)

"Where the Court erroneously designated findings on matters of fact as conclusions of law, and

on other findings only as to what witnesses testified, and it was impossible to tell from the findings what the basis of the court's judgment was, the judgment was set aside and the cause remanded for a fuller compliance with Rule 52(a)."

Polaroid Corp. v. Markham, 151 F. (2d) 89. (U.S.C.A., D. C.)

"Since the court in passing on a motion to dismiss for failure to prove a case is ruling on a question of fact, it must make findings of fact and conclusions of law.

As appears from the record, the latter rule was ignored and while none of the parties has raised the question, in order that the broad purposes of the rule may be achieved, we determine whether or not when a motion to dismiss is sustained under 41(b) at the conclusion of the plaintiff's evidence in a case tried by the court, findings of fact should be made.

The primary purpose of the Congress in authorizing the Supreme Court by rules to prescribe forms of process, writs, pleadings and motions and the practice and procedure in civil actions at law and to establish one form of civil actions and procedure in cases of equity and actions at law was to expedite and simplify the administration of justice. If the rules are to have vitality and accomplish their purpose, they must be followed."

Bach v. Friden Calculating Machine Co., Inc. 148 F. (2d) 407.

Young v. United States, 111 F. (2d) 823.

This was an action tried in the Ninth Circuit. The ruling in this case clearly shows the necessity for findings in cases tried without a jury where issues of law and fact are raised. Also this case represents the normal course of an action. The case was argued and submitted July 13, 1939. On August 2nd a minute order was entered ordering judgment in favor of defendants. On August 30, 1939, the court made findings of fact and entered judgment. The appeal was taken from the judgment of August 30th.

If the ruling in the instant case was correct and the order of December 26, 1944, final and appealable, why was not the same thing true in the *Young* case?

Lee v. Walworth Co., 1 F. R. D. 569.

(The colloquy reported below took place in the District Court for the Southern District of New York on December 11, 1940.)

In this case the defendant's motion for a decree dismissing the bill of complaint was granted. Mr. Clune, attorney for plaintiff, addressing Mr. Land, attorney for defendant, said:

> "Would you stipulate to waive?
>
> The Court. I will answer that, you may not waive findings of fact. Any doubt about that would be very definitely eliminated by the Supreme Court decisions in the last year or two. The farthest we may go is to say that it is not necessary to have findings of fact and conclusions of law unless an appeal is not taken. If an appeal is taken, there should be findings of fact and conclusions of law.

Mr. Clune. Then the time to file findings of fact and conclusions, which will be done by the defendant I suppose—I just wanted to limit the time.

The Court. The reason why I state that findings of fact and conclusions of law should be presented promptly is that I wanted them in while the facts are still fresh in my own mind.

Mr. Clune. The defendant would have to do it, anyway.

Mr. Land. Both sides usually.

The Court. If you take an appeal, I suppose the other side would make the findings of fact and conclusions of law, but I think you might be interested in those findings of fact and conclusions of law yourself."

II.

THE RULING OF THE COURT IS A VIOLATION OF RULE 5(d), RULES OF PRACTICE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

The decision of the Circuit Court deprives the losing party of findings of fact and conclusions of law in any case involving an issue of fact. It is therefore contrary to Rule 5(d), Rules of the District Court for the Northern District of California, and to other privileges accorded him by such rule. Rule 5(d) follows:

"5(d) *Settlement of Orders and Judgments by the Court.* Within five days of the decision of the Court giving any order which requires settlement

and approval as to form, the prevailing party shall prepare a draft of the order or judgment embodying the Court's decision and present it for approval to each party who has appeared in the action. Each party shall examine it at once, and if he approves, endorse with the words, 'Approved as to form, as provided in Rule 5(d),' and append his signature thereto. Such endorsement shall not affect the rights of any party, but shall be considered only as an indication to the Judge that the form is correct. If any party does not approve, he shall endorse with the words, 'Not approved as to form, as provided in Rule 5(d),' specifying his reasons. The party proposing the order or judgment shall thereupon serve a copy upon each other party, and lodge the original and one copy with the Clerk. Each party who disapproves the order or judgment shall have five days within which to serve and lodge with the Clerk proposed modifications thereof. If all parties approve, or if no modifications are presented within said five days, the order or judgment if approved by the Judge, shall be signed and filed by him. If any proposed modifications of the order or judgment are presented as herein provided, the Judge shall order such modifications made as he deems proper. If the attorney for the prevailing party fails to observe the above provisions, any attorney in the case may submit to the Judge a draft of the proposed order or judgment.

(e) *Findings of Fact and Conclusions of Law.* Within five days after receipt of written notice of an opinion or memorandum order for judgment, the prevailing party shall prepare a draft

of the findings of fact and conclusions of law and lodge them with the Clerk, serving a copy upon the adverse party, who may within five days thereafter file with the Clerk and serve upon the prevailing party his proposed amendments. If the adverse party proposes no amendments he may endorse his approval on the original draft, which may then be presented immediately to the Judge for his signature.

If the prevailing party fails to lodge and serve his draft within five days the adverse party may proceed within five days thereafter as herein provided.

The findings of fact and conclusions of law shall thereafter be settled by the Judge, and when so settled shall be signed by him and filed."

III.

THE COURT ERRED IN DECLARING THE ORDER OF DECEMBER 26, 1944, FINAL AND APPEALABLE INASMUCH AS IT LACKED CERTAIN INDISPENSABLE REQUISITES OF A FINAL JUDGMENT.

The order of December 26, 1944, lacked certain indispensable requisites of a final judgment.

"Order," "judgment" and "decree" are not synonymous. "Judgment" and "decree" are fixed terms. Except as modified by other words, such, for instance, as "interlocutory", their meaning is always the same. An "order" may be anything from the continuance of a trial date to an order dismissing a cause for lack of prosecution. Such orders as the one last named are

usually final and appealable orders. However, careful practitioners usually have them followed by a "judgment of dismissal".

Occasionally one finds a judgment captioned an "order", as in *Sosa v. Royal Bank of Canada,* 134 F. (2d) 955, where appears what is captioned an "Order Sustaining Motion to Dismiss". It dismissed the complaint, awarded costs and directed the issuance of an execution. It was therefore in fact a judgment, though captioned an order. Its last paragraph begins "It is, therefore, ordered, adjudged and decreed", etc.

In the instant case, irrespective of appellant's right to findings of fact and conclusions of law, followed by a decree, the order was incomplete for the following reasons:

1. The date of the trial is stated in the decree, but not in the minute order.

2. The decree contains a statement of the character of the evidence used at the trial or hearing; the minute order does not.

3. That the amended libel is by the decree dismissed *without leave to amend.* The words in italic do not appear in the minute order.

4. The following words do not appear in the minute order: *That the amended compensation award of respondent Deputy Commissioner Warren H. Pillsbury dated and filed on the 15th day of April, 1944, directing libelants above named to pay the claimant, Walter L. Wood, compensation as provided therein be and the same is hereby affirmed.*

5. *That each party will pay its own costs.* The words in italic do not appear in the minute order.

6. The approval of libelants' counsel as to form does not appear in the minute order as required by Rule 5(d), Rules of Practice of the District Court.

7. The words: *Entered in Vol. 35, Judg. and Decrees at Page 368* do not appear in the minute order.

8. The minute order deprives the losing party of findings if considered final and appealable; the decree (preceded by findings) enables him to present a complete case.

IV.

THE RULING OF THE CIRCUIT COURT IS UNAUTHORIZED BY STATUTE AND CONTRARY TO THE DECISIONS.

It will be noted that the only authority cited by the Circuit Court is Section 128(a) of the Judicial Code, 28 U. S. C. A. Section 225(a). So much of this section as is applicable reads:

> "225. (Judicial Code, Section 128, amended.) Appellate Jurisdiction—
>
> (a) Review of final decisions. The Circuit Courts of Appeals shall have appellate jurisdictions to review by appeal or writ of error final decisions:
>
> First. In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title. * * *"

The above is, of course, not an authority for deciding what is and what is not a final judgment. Nor have your petitioners been able to find any case sustaining the ruling of the Circuit Court.

Monarch Brewing Co. v. George J. Meyer Mfg. Co., 9 Cir., 130 F. (2d) 582, 583, is a leading authority to the contrary:

> "Before proceeding to a discussion of the allegations of the complaint upon which the Court granted the defendant summary judgment, we are faced with a question raised by the defendant as to whether or not the appeal herein was timely. It appears that on October 8, 1941, the District Court made its order reading in part as follows:
>
> 'The motion of the Defendant for summary judgment in its favor * * * heretofore argued and submitted, is now decided as follows:
>
> 'The said motion is hereby granted upon the ground * * *.'
>
> The order was entered on the docket of the District Court on the same day. On October 13, 1941, the following judgment was entered:
>
> ' "The defendant * * * having filed herein on the 9th day of August, 1941, its written motion for summary judgment in its favor * * * and said motion having come on regularly for hearing before the above entitled court * * * on the 29th day of September, 1941, and the Court, after hearing the arguments of counsel, having taken the matter under submission, and, thereafter, being fully advised in the premises, having filed herein its memorandum decision, dated the 8th day of October, 1941, granting said motion:

' "It is therefore ordered, adjudged and decreed that the plaintiff take nothing by its action against the defendant, and that the defendant have and recover from the plaintiff defendant's costs herein * * *." Notice of appeal herein was filed on January 13, 1942, exactly three months after the entry of the last mentioned document, but more than three months after the entry of the order first referred to. The question as to whether or not this appeal is timely, then, depends on whether the first order was a final decision of the District Court. Sec. 128 Judicial Code, 28 U.S.C.A. Sec. 225: 28 U. S. C. A. Sec. 230.

We are of the opinion and hold that the appeal was properly taken. We are satisfied that the order of October 8th was not intended as the rendition of a judgment in favor of the defendant. Instead the trial judge announced that he granted the defendant's motion. This motion was that a judgment be entered in its favor. The subsequent order of October 13th refers to the October 8th order as a 'memorandum decision' granting the defendant's motion, and was unquestionably intended by the trial court as the final decision in the case. The situation would seem analogous to one where the trial court grants a motion to dismiss, in which case *this court has held that no appeal may be taken from the order granting the motion, but that it must be taken from the judgment of dismissal.* See City and County of San Francisco v. McLaughlin, 9 Cir., 9 F. (2d) 390; Wright v. Gibson, 9 Cir., June 15, 1942, 128 F. (2d) 865." (Italics ours.)

Monarch Brewing Co. v. George J. Meyer Mfg. Co., 9 Cir., 130 F. (2d) 582, 583.

"The first question which arises is whether the order was appealable. If it was not, this court has no jurisdiction. It is the duty of the court to determine this jurisdictional question. City and County of San Francisco v. McLaughlin (C.C.A. 9) 9 F. (2d) 390; Highway Const. Co. v. McClelland, 14 Fed. (2d) 406 (C.C.A. 8); Equitable Life Assur. Soc. v. Rayl, 16 F. (2d) 68 (C.C.A. 8). It is well settled that an order sustaining a demurrer to a complaint, or granting a motion to dismiss a complaint, *without entry of judgment,* is not a final order within the meaning of Section 128 Judicial Code (28 U.S.C.A. 225)."

Dyar v. McCandless (C.C.A. 8), 33 F. (2d) 578, 579.

"A writ of error operates only on a record in which a final judgment has been entered."

Morris v. Dunbar (C.C.A. 3), 149 F. 406.

"It is well settled that an order sustaining a demurrer to a petition is not a final order within the meaning of 28 U.S.C.A., Sec. 225 (citing cases). The proper procedure is for the plaintiffs to elect to stand upon their petition and to let a final judgment of dismissal be entered against them. An appeal will then lie from such final order and the ruling on the demurrer may be reviewed."

Dye v. Farm Mortgage Inv. Co. (C.C.A. 10), 70 Fed. (2d) 514.

In *Rardin v. Messick,* 78 F. (2d) 643, an appeal from the opinion of the Court and not from its final

decree (made *nunc pro tunc* after three months) was dismissed.

CONCLUSION.

In conclusion your petitioners respectfully submit that a writ of certiorari should be granted.

1. Because there is no law, either statute or of the decisions, authorizing the decision of the Circuit Court.

2. Because the ruling of the Court deprived your petitioner of the privilege of having findings of fact, contrary to Rule 52(a), Rules of Civil Procedure.

3. Because, where a case is tried and issues of fact determined, no abbreviated order of the Court is a "final order" as long as findings of fact and conclusions of law are yet to come. (*Monarch Brewing Co. v. George J. Meyer Mfg. Co.*, 9 Cir., 130 F. (2d) 582, supra.)

4. That the order was not submitted to your petitioners for approval as to form, as required by Rule 5(d), Rules of the District Court.

5. That the order of December 26, 1944, is incomplete as heretofore shown.

6. That the order of December 26, 1944, was not regarded by the District Judge who signed it as a final order or judgment in the case. Otherwise he would not subsequently have signed findings and a decree.

Wherefore, petitioners respectfully urge that a writ of certiorari be issued as prayed.

Dated, San Francisco, California,
May 27, 1946.

Respectfully submitted,
THEODORE HALE,
Counsel for Petitioners.

CARROLL B. CRAWFORD,
Of Counsel.

Liberty [illegible]
corpora[illegible]
Naval A[illegible]

vs.

Warren H. P[illegible]
sioner of the United [illegible]
Compensation Commission [illegible]
Compensation District [illegible]
Wood,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

FINAL BRIEF FOR PETITIONERS.

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Table of Authorities Cited

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OCTOBER TERM, 1946

No. 128

LIBERTY MUTUAL INSURANCE COMPANY (a corporation), and CONTRACTORS PACIFIC NAVAL AIR BASES, an association,

Petitioners,

vs.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District and WALTER L. WOOD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

FINAL BRIEF FOR PETITIONERS.

To the Honorable Supreme Court of the United States:

Your petitioners, Liberty Mutual Insurance Company, a corporation, and Contractors Pacific Naval Air Bases, an association, respectfully submit herewith a copy of an opinion of the United States Circuit Court of Appeals for the Eighth Circuit, entitled *St. Louis Amusement Company, et al. v. Paramount Film Distributing Corporation, et al.,* and numbered therein No. 13,180. The opinion was filed in the Circuit Court on July 15, 1946, but was not available in the advance sheets of the Federal Reporter when this brief was sent to the printer, hence the precise citation as to volume and page cannot be given.

This opinion, while of course in no way binding on the Supreme Court of the United States, contains pertinent citations from that Court, and, in itself, distinguishes a premature appeal from one taken from a final judgment very clearly and concisely.

The opinion is as follows:

Before SANBORN, WOODROUGH, and RIDDICK, Circuit Judges.

Per Curiam:

This action was brought by the owners and operators of several moving picture theatres in St. Louis against a number of picture distributing corporations and others[1] for injunction and treble

[1]Paramount Pictures, Inc., Paramount Film Distributing Corporation, RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, Warner Bros. Pictures, Inc., Warner Bros., Pictures Distributing Corporation, Vitagraph, Inc., American Arbitration Association, Appollo Theatre Corporation, Harold D. Conner, Harry G. Erbs, Adolph Rosecan, Joseph Litvag.

damages for alleged violations of the Federal anti-trust laws. The complaint charged conspiracy in restraint of trade and concerted action by defendants to exclude the plaintiffs from the use of motion pictures except upon terms and conditions alleged to be unlawfully imposed and maintained by means of the conspiracy. The cause was heard by the trial court upon the complaint and the motion of the several defendants to dismiss and for summary judgment, and thereafter the court filed in the cause the document which appears in the transcript of record on appeal entitled "Opinion and Order Sustaining Motions of Defendants to Dismiss and for Summary Judgment."[2] It is in the conventional form of an opinion by the District Judge, disclosing the issues considered and the conclusions reached, and the dismissal and summary judgment determined upon are indicated in mandatory form in the words "The motions of defendants to dismiss and for summary judgments are sustained."

The plaintiffs in taking their appeal to this court have evidently considered and relied upon the written opinion of the trial judge as a final judgment in the cause, reviewable as such in this court, and the appeal has been briefed, argued and submitted on that assumption. But on the merits the case will present important questions of general interest in which the decision of this court may ultimately be intermediate and not final, and we have thought it necessary to carefully consider whether the record containing only an opinion which the District Judge has caused

[2]It bears the date of its composition August 6, 1945, and appears to have been filed in the office of the Clerk August 7, 1945.

to be filed and not disclosing the entry of a judgment as required by the Federal Rules, may be held to present to us a final judgment which we are empowered to review. We are mindful that if we proceed upon insufficient foundation of jurisdiction needless expense and delay will be occasioned.

Rule 79(a) of the Federal Rules of Civil Procedure requires the Clerk to keep a "civil docket" and to enter therein chronologically brief notations of each order or judgment. Rule 58 of the Rules provides in part: "The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry."

In view of Rule 58, we are constrained to hold that the mere filing of the judge's opinion in this case which is shown by the transcript of the record before us, does not establish that a final judgment has been entered which has been made effective in the manner prescribed by the Rules and which is reviewable in this court. If no judgment has been docketed, there is no judgment from which to appeal and the appeal is premature. We are in accord with the statement of the law by the Third Circuit Court of Appeals in *In re D'Arcy,* 142 F.2d 313, 315, as follows:

"In the federal courts an opinion is not a part of the record proper. *England v. Gebhardt,* 1884, 112 U.S. 502, 506, 5 S. Ct. 287, 28 L. Ed. 811. Consequently, a statement in an opinion of the conclusion reached by the court, even though couched in mandatory terms, cannot serve as the order or judgment of the court. It is necessary that a definitive order or judgment be made and

entered in the court's docket in due form. In *Alleghany County v. Maryland Casualty Co.*, 3 Cir., 1943, 132 F.2d 894, 897, certiorari denied 318 U.S. 787, 63 S. Ct. 981, 87 L. Ed. 1154, we pointed out the vital importance of a court's judgment being clear and unambiguous. For similar reasons Civil Procedure Rule 79 (a), 28 U.S.C.A. following section 723c, requires that all orders and judgments of the district court in civil actions shall be noted in the docket on the folio assigned to the action and Rule 58 provides that the notation of a judgment in the docket as provided by Rule 79 (a) shall constitute the entry of the judgment and that the judgment shall not be effective before such entry."

Also see *United States v. Hark,* 320 U.S. 531; *Uhl v. Dalton,* 9 Cir., 151 F.2d 502.

The appeal is dismissed as prematurely taken.

A true copy.

Attest:
(Seal) E. E. Koch,
Clerk, U. S. Circuit Court of Appeals, Eighth Circuit.

Dated, San Francisco, California,
September 20, 1946.

Respectfully submitted,
THEODORE HALE,
Counsel for Petitioners.

CARROLL B. CRAWFORD,
Of Counsel.

INDEX

CITATIONS

702553—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 128

LIBERTY MUTUAL INSURANCE COMPANY, A CORPORATION, AND CONTRACTORS PACIFIC NAVAL AIR BASES, AN ASSOCIATION, PETITIONERS

v.

VARREN H. PILLSBURY, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, AND WALTER L. WOOD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT PILLSBURY, DEPUTY COMMISSIONER, IN OPPOSITION

OPINIONS BELOW

The district court wrote no opinion. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 173–175) is reported at 154 F. 2d 559.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on March 18, 1946 (R. 175). A

petition for rehearing was denied on April 23, 1946 (R. 176). The petition for a writ of certiorari was filed on May 29, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether, in a proceeding to review a compensation order of a Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act, a district court is required by Rule 52 (a) of the Federal Rules of Civil Procedure to make findings of fact.

2. Whether, in a proceeding in a district court to review a compensation order under the Longshoremen's and Harbor Workers' Compensation Act, an order of dismissal signed by the district judge, filed as a part of the record in the case and duly noted in the district court civil docket, is a final order.

3. Whether the time permitted by the Act of March 3, 1891, 28 U. S. C. 230, for appeal to a circuit court of appeals must be calculated from the date of the notation of such order of dismissal in the district court civil docket, in the absence of a petition for rehearing or other proceeding subsequent to judgment in the district court seeking to alter the rights already adjudicated.

STATUTES AND RULES INVOLVED

Relevant statutes and rules of procedure are set forth in Appendix, *infra*, pp. 17–22.

STATEMENT

Respondent Wood injured his back while employed by Contractors Pacific Naval Air Bases at a military base in Hawaii (R. 5–6). As a result of the injury, a serious back condition developed and became apparent on December 23, 1942, and Wood was hospitalized and required extensive medical treatment (R. 6–7). On July 12, 1943, Wood filed a claim for compensation in accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. 901 *et seq.*) as made applicable to employees at defense base areas by the Defense Bases Act of August 16, 1941, 55 Stat. 622, 42 U. S. C., Supp. IV, 1651–1654 (R. 5, 7). On July 21–23, 1943, and on September 20, 1943, hearings were held before the respondent Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District (R. 52–158). Findings of fact were made by the Deputy Commissioner on April 15, 1944 (R. 5–7), and a compensation order of $953.57, for disability from December 23, 1942, to September 16, 1943, was entered in favor of the respondent Wood.[1]

[1] Earlier findings of fact, order and award in favor of respondent Wood had been made by the Deputy Commissioner on November 6, 1943 (R. 48–50). A proceeding was instituted by petitioners to review the order and award of November 6 but, at the suggestion of the Employees' Compensa-

This proceeding to review the Deputy Commissioner's order of April 15, 1944, was instituted on May 12, 1944, in the District Court of the Northern District of California, Southern Division, in accordance with the procedure set forth in Section 21 (b) of the Longshoremen's and Harbor Workers' Act, *infra*, p. 17 (R. 9–10, 22).[2] On July 11, 1944, a motion to dismiss the proceeding was made on behalf of the Deputy Commissioner on the grounds that his findings of fact were supported by evidence and were, accordingly, final and conclusive, and that the compensation order was in accordance with law (R. 22–23).[3] The case was heard in the district court on December 11, 1944 (R. 168). On December 26, 1944, the district judge granted the motion to dismiss and ordered that the proceeding be dismissed (R. 24). On the same day the order of dismissal, duly signed by the district judge (R. 24), was filed as part of the record in the case and the district

tion Commission, the district court remanded the matter to the Deputy Commissioner for an amendment of the finding of fact with regard to notice of injury (R. 4).

[2] The procedure for judicial review of compensation awards contained in Section 21 (b) is applicable to awards made under the Defense Bases Act of August 16, 1941, *supra*, 42 U. S. C., Supp. IV, 1651. The district court is empowered to set aside the compensation order "if not in accordance with law * * *." Section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act, *infra*, p. 17.

[3] A certified transcript of the entire record before the Deputy Commissioner was included in the record in the district court (R. 19–20, 21, 23).

court clerk made the required notation in the docket (R. 168).

Subsequently, on February 21, 1945, prepared findings of fact, conclusions of law, and a formal decree were signed by the district judge (R. 24–29). The decree was marked as entered in "Vol. 35 Judg. and Decrees at Page 368" (R. 29, 169).

On April 24, 1945, petitioners appealed from the "decree" of February 21, 1945 (R. 30–31).[4] The principal point on which petitioners sought review was the alleged failure of respondent Wood to file his claim for compensation within the time permitted by statute (R. 33, 34).

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[4] This proceeding was instituted in the district court by the filing of a libel and the appeal was taken under appellate procedure applicable to admiralty cases. Petitioners, on April 24, 1945, petitioned for leave to appeal from the decree of February 21, 1945 (R. 30–31). An order was made by the district judge on the same day allowing an appeal from "* * * a final decree and judgment heretofore made * * *" in the case (R. 31). The further formal perfecting of the appeal was in accordance with admiralty rules (R. 32–42). However, the petition for certiorari properly treats the case, insofar as rules of procedure are involved, as a civil proceeding governed by the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure are specifically applicable to judicial review under the provisions of Section 21 of the Longshoremen's and Harbor Workers' Act, *supra*. F. R. Civ. P., Rule 81 (a) (6), as amended. The propriety of the application of the Federal Rules of Civil Procedure to such review proceedings is treated more fully in our brief in opposition in *J. E. Haddock, Ltd., et al.* v. *Pillsbury, Deputy Commissioner, et al.*, No. 158, this Term.

Respondents suggested lack of jurisdiction to the court below on the ground that the dismissal order of December 26, 1944, was final and that petitioners' time for appeal had accordingly expired on March 26, 1945. This jurisdictional objection was sustained and the appeal was dismissed on March 18, 1946 (R. 175).

ARGUMENT

The district court order of dismissal on December 26, 1944, was clearly a final decision, appealable to the court below. Petitioners' time to appeal began to run on the same day, the date of notation of the dismissal order in the district court civil docket, and expired on March 26, 1945. Accordingly, the court below correctly dismissed petitioners' appeal, taken on April 24, 1945, as out of time. Petitioners here seek to recapture their lapsed statutory privilege of appeal by attacking the December 26 order on the ground of asserted deficiencies of form. From this, they argue that the "decree" of February 21, 1945 must be considered the final decision in the proceeding for the purpose of computing the appeal period. Petitioners do not contend that the substantive effect of the December 26 order was in any way varied or affected by the "decree" of February 21. In an effort to acquire substantive content for their position, petitioners assert that the decision below deprives them of findings of fact by the district judge to which they claim a right under Rule 52 (a) of the Rules of Civil

Procedure. We submit that petitioners' finding-of-fact argument is illusory and that such formal differences as existed between the December 26 order and the decree of February 21 are immaterial to the issue here presented.

1. *In an action to set aside the order of a Deputy Commissioner, the district court is not required to make findings of fact.*—Petitioners attack the holding of the court below on the ground that it deprives them of the findings of fact to which they have a "right" by virtue of Rule 52 (a) of the Rules of Civil Procedure (Pet. 6–7, 8, 14–18). The short answer to this argument is that the district court does not sit as a trier of fact in proceedings brought to review administrative orders or findings and that such proceedings are not "* * * tried upon the facts without a jury * * *" within the meaning of Rule 52 (a). On the contrary, the sole question presented to the district court herein was a question of law, namely, whether the findings of the deputy commissioner were supported by evidence and the compensation order "* * * in accordance with law * * *."[5] Section 21

[5] On appeal, the same question would be presented on the same record, *i. e.*, the record before the district court. The extent to which appellate review might be impeded by district court findings is illustrated by a comparison of the prepared findings herein (R. 25–26) with the original findings of the deputy commissioner (R. 48–50) and his corrected findings (R. 5–7), particularly with regard to notice of injury by respondent Wood, a point as to which petitioners assigned error to the court below (R. 34).

702553—46——2

(b) of the Longshoremen's and Harbor Workers' Act, 33 U. S. C. 921 (b), *infra*, p. 17; cf. *Yakus* v. *United States*, 321 U. S. 414, 437; *Reconstruction Finance Corp.* v. *Bankers Trust Co.*, 318 U. S. 163, 170; *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177; *Interstate Commerce Comm.* v. *Louisville and Nash. R. R.*, 227 U. S. 88, 92 Rule 52 (a) does not enlarge the power of district courts in proceedings of this kind nor does it modify the substantive principles of the above cited cases. The duty of finding the facts in compensation proceedings has been committed to the administrative body and an independent exercise of judgment on factual issues by a reviewing district court would be improper. *Cf. Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146.

The precise contention made by petitioners herein with regard to their "right" to independent findings of fact by the district court was recently before this Court in *Texas Electric Ry. Co.* v. *Eastus*, 308 U. S. 512. There a three-judge court, convened to review an order of the Interstate Commerce Commission, had specifically refused to make independent findings of fact on the ground that the power to make such findings had been lodged in the Interstate Commerce Commission by statute and that the sole function of the court was to determine whether the Commission's findings were legally made and supported by substantial evidence (R. 241, No.

31, Oct. T. 1939). The appellant excepted to this action on the ground that the court had not found the facts specifically as required by Rule 52 (a), F. R. Civ. P. (R. 243, No. 31, Oct. T. 1939). The point was specified as error in the appellant's brief (R. R. Br. 13, No. 31, Oct. T. 1939) and was briefed and argued by the Government (Appellees' Br., 32–35, No. 31, Oct. T., 1939). This Court affirmed the decision of the three-judge court.

We submit, accordingly, that a district judge has no duty to make findings of fact under Rule 52 (a) in cases involving review of administrative action where the administrative agency is itself required to find the facts.

2. *The order of dismissal of December 26, 1944 was a final decision, appealable to the court below.*—Circuit courts of appeals are empowered by Section 128 of the Judicial Code, 28 U. S. C. 225, *infra*, p. 17, to review final decisions of district courts. Finality is the crucial factor which gives rise to this appellate power and to the privilege of invoking it; finality exists where the decision adjudicates the right of the parties (*Department of Banking* v. *Pink*, 317 U. S. 264, 268) and terminates the particular cause. *Ex parte Tiffany*, 252 U. S. 32; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Weston* v. *City Council*, 2 Pet. 449.[6]

[6] Petitioners' effort to find some telling distinction between "order" and "judgment" or "decree" is without merit or substance. For the purpose of the issue presented herein, the

An order which dismisses an action is such a final decision. *Wilson* v. *Republic Iron Co.*, 257 U. S. 92, 96; *Vietti* v. *Wayne*, 136 F. 2d 771 (App. D. C.); *Jefferson Electric Co.* v. *Sala Electric Co.*, 122 F. 2d 124 (C. C. A. 7); *Hicks* v. *Bekins Moving and Storage Co.*, 115 F. 2d 406 (C. C. A. 9); *Bailey* v. *Crump*, 41 F. 2d 733 (C. C. A. 4).

The order of December 26 was not, as petitioners appear to contend, an order which merely sustained respondent Pillsbury's motion to dismiss. On the contrary, it was clearly an order which dismissed the proceeding.[7] As such, it was final and appealable. Under Rule 41 (b), F. R. Civ. P., *infra*, p. 18, the dismissal operated as an adjudication upon the merits.[8] Moreover,

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terms are interchangeable so long as the requisite finality is present. *Cf.* Rule 54 (a), F. R. Civ. P.; *Department of Banking* v. *Pink*, *supra*, at 266, 268; *Ex parte Tiffany*, *supra*, at 36.

[7] *City and County of San Francisco* v. *McLaughlin*, 9 F. 2d 390 (C. C. A. 9), and *Wright* v. *Gibson*, 128 F. 2d 865 (C. C. A. 9), cited by petitioners, fully support the action of the court below herein. In both cases, the Ninth Circuit Court of Appeals carefully distinguished between an order which merely granted a motion to dismiss and an order of dismissal. In both cases, an attempted appeal from an order granting a motion to dismiss was held premature, but full recognition was given to the appealability of an order or dismissal. Cf. *Monarch Brewing Co.* v. *George J. Meyer Mfg. Co.*, 130 F. 2d 582 (C. C. A. 9).

[8] Petitioners criticize the December 26 order for failing to state that the dismissal was "* * * without leave to amend * * *" (Pet. 7). The force of Rule 41 (b) is exactly contrary to this position. Under the rule, any involuntary dismissal (other than for lack of jurisdiction or

if the dismissal had left the merits undetermined, the order was nonetheless final and appealable. *Wilson* v. *Republic Iron Co., supra,* at 96; *Weston* v. *City Council, supra.* Nor was there any petition for rehearing or other proceeding in the district court subsequent to December 26, 1944, which in any way affected or sought to affect the rights adjudicated by the December 26 order. Cf. *Department of Banking* v. *Pink, supra,* at 266–267.

3. *Petitioners' time within which to appeal expired on March 26, 1945.*—The Act of March 3, 1891, 26 Stat. 826, 829, as amended, 28 U. S. C. 230, *infra,* pp. 17–18, permits an appeal to a circuit court of appeals from a final decision of a district court only if the appeal be taken within three months from the entry of the district court judgment. Under Rule 58 of the Rules of Civil Procedure, *infra,* p. 19, the notation of a judgment in the civil docket as provided by Rule 79 (a), *infra,* pp. 19–20, constitutes the entry of the judgment.

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improper venue) automatically operates as an adjudication upon the merits unless the court in its order otherwise specifies. A somewhat related objection, that the December 26 order failed to state that the compensation order was affirmed (Pet. 7), is similarly without merit. The dismissal under Rule 41 (b) fully sufficed to affirm the deputy commissioner's action. Further, we believe the involuntary dismissal to be the correct procedure since a reviewing district court is only empowered to set aside a compensation order if not in accordance with law.

As shown above, the December 26 order was final and appealable. It was, accordingly, a judgment under Rule 54 (a) of the Rules of Civil Procedure, *infra,* p. 18. Signed by the district judge,[9] it was filed by the district court clerk on December 26, 1944, and, on the same day, was noted by the clerk in the civil docket. Thus, pursuant to Rule 58, *infra,* p. 19, judgment was entered on December 26 and the three month period allowed to petitioners within which appeal to the court below expired on March 26, 1945.

There is no merit to petitioners' various attacks on the form of the December 26 order, nor do these attacks in any wise destroy or change the character of that order as final. Primarily, petitioners criticize the December 26 order for failure to conform to the provisions, as to settlement and approval, of Rule 5 (d) of the Rules of Practice of the District Court for the Northern District of California, *infra,* pp. 21–22 (Pet. 8). The provisions of Rule 5 (d) come into play only in connection with orders which require settlement and approval. Pursuant to Rule 58, F. R. Civ. P., the December 26 order, an order directing that there be no recovery, is not an order or judgment

[9] By Rule 5 (c) (3) of the Rules of Practice of the United States District Court for the Northern District of California, *infra,* p. 21, the district judge's direction to enter judgment is evidenced by his signature on the order where, as here, the direction was not given to the clerk in open court and accordingly noted in the minutes.

which requires settlement and approval as to form. Obviously, the provisions of Rule 5 (d) are inapplicable herein.

Petitioners also attack the December 26 order for failure to provide for the payment of costs, provision for which is contained in the formal decree of February 21. The failure to provide for costs or for other ministerial matters has never been held to effect the character of an order as final. *Fowler* v. *Hamill,* 139 U. S. 549; *Sizer* v. *Many,* 16 How. 98; *Johnson* v. *Wilson,* 118 F. 2d 557 (C. C. A. 9); *Allis-Chalmers Co.* v. *United States,* 162 Fed. 679 (C. C. A. 7); *Prescott & A. C. Ry. Co.* v. *Atchison, T. & S. F. R. Co.,* 84 Fed. 213 (C. C. A. 2); *Craig* v. *The Hartford,* 1 McAll. 91, Fed. Case No. 3333 (C. C. D. Cal.). Recognition of the ministerial nature of the taxation of costs is shown in Rule 54 (d), F. R. Civ. P., *infra,* p. 19, which provides that costs may be taxed by the clerk on one day's notice, and by Rule 5 (c) (1) of the local rules of the Northern District of California, *infra,* pp. 20–21, which specifically direct that the notation of judgment by the clerk in the civil docket shall not be delayed pending taxation of costs.

Petitioners set forth certain other minor criticisms, such as the failure of the December 26 order to state the date of trial and to set forth the "* * * character of the evidence

used * * *"[10] (Pet. p. 7). These contentions are obviously immaterial in considering the finality of the order.[11] In essence, petitioners are attempting to establish the formal decree of February 21 as the final decision in the proceeding without showing any substantive difference in effect between that decree and the order of December 26. They rely principally on the circumstance that the February 21 decree was entered in "Vol. 35, Judg. and Decrees, at page 368 * * *" (Pet., p. 8). In other words, petitioners' arguments lead to the proposition that there were two final orders in the district court, and that they were entitled to calculate their appeal period from the second order, which happened to be later in time and hence extended the appeal time. Such a contention necessarily raises questions as to the power of a district judge, or of the parties to a proceeding, to extend the statutory appeal period by action which in no way changes the substantive effect of an earlier final order or decree (*United States* v. *Rayburn*, 91 F. 2d 162 (C. C. A. 8); *United States* v. *Hall*, 83 F. 2d 94 (C. C. A. 1)) or of the propriety of the issuance by a district judge of subsequent unnecessary and confusing orders. Cf. *Mosier* v.

[10] As already noted, the "evidence" in proceedings of this type consists solely of the record before the compensation commissioner in the proceeding under review.

[11] Two further criticisms of the December 26 order are discussed above in note 8, pp. 10–11.

Federal Reserve Bank, 132 F. 2d 710 (C. C. A. 2). However, we do not believe that a proper understanding of the nature of the February 21 decree requires consideration of such questions. Traditionally, a "judgment docket" has been maintained in federal district courts for the convenience of parties seeking to check lien records or to search for similar information. See *Polleys* v. *Black River Co.,* 113 U. S. 81. Such judgment books are "* * * made up necessarily after the main judgment * * *." *Polleys* v. *Black River Co., supra,* pp. 83–84. The practice of keeping such a record is continued by Rule 79 (b), F. R. Civ. P., *infra,* p. 20, which requires district court clerks to keep a "civil order book" in which exact copies of final judgment and orders are to be kept. This "civil order book" is not the civil docket maintained under Rule 79 (a) nor is the entry of a formal decree in the civil order book the same as that notation in the civil docket under Rule 79 (a) which constitutes the entry to judgment. We submit that the formal decree of February 21 was prepared for use in the civil order book maintained by the district court clerk under Rule 79 (b) and that it did not in any sense extend petitioners' time to appeal. *Fowler* v. *Hamill,* 139 U. S. 549; *Polleys* v. *Black River Co.,* 113 U. S. 81; *Prescott & A. C. Ry. Co.* v. *Atchison, T. & S. F. R. Co.,* 84 Fed. 213 (C. C. A. 2).

CONCLUSION

The decision below is clearly correct. There is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
PAUL A. SWEENEY,
SAMUEL D. SLADE,
Attorneys.

JULY 1946.

APPENDIX

1. STATUTES

A. Section 21 (b) of the Longshoreman's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, Sec. 21, 44 Stat. 1436, as amended, 33 U. S. C. 921 (b), provides in pertinent part:

> (b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the district court of the United States for the District of Columbia if the injury occurred in the District).

B. Section 128 of the Judicial Code, 28 U. S. C. 225, provides in pertinent part:

> Appellate jurisdiction—
> (a) *Review of final decisions.*—The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—
> First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title.

C. The Act of March 3, 1891, c. 517, Sec. 11, 26 Stat. 829, as amended, 28 U. S. C. 230 provides:

Time for making application for appeal.—No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.

2. FEDERAL RULES OF CIVIL PROCEDURE

A. Rule 41 (b) provides:

(b) *Involuntary Dismissal: Effect Thereof.*—For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

B. Rule 54 (a) provides:

(a) *Definition; Form.*—"Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

C. Rule 54 (d) provides:

> (d) *Costs.*—Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

D. Rule 58 provides in pertinent part:

> *Entry of Judgment.*—* * * When the court directs the entry of a judgment that a party recover only money or costs or that there be no recovery, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry.

E. Rule 79 (a) provides:

> (a) *Civil Docket.*—The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Attorney General under the authority of the Act of June 30, 1906, c. 3914, § 1 (34 Stat. 754), as amended, U. S. C., Title 28, § 568, or other statutory authority, and shall enter therein each civil action to which these rules are made applicable. Actions

upon each other party, and lodge the original and one copy with the Clerk. Each party who disapproves the order or judgment shall have five days within which to serve and lodge with the Clerk proposed modifications thereof. If all parties approve, or if no modifications are presented within said five days, the order or judgment, if approved by the Judge, shall be signed and filed by him. If any proposed modifications of the order or judgment are presented as herein provided, the Judge shall order such modifications made as he deems proper. If the attorney for the prevailing party fails to observe the above provisions, any attorney in the case may submit to the Judge a draft of the proposed order or judgment.

U. S. GOVERNMENT PRINTING OFFICE: 1946